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## CIRCUIT COURT OF FREDERICK COUNTY.

ROBERT M. WARD v. THE CITY OF WINCHESTER, as trustee under the will of John Handley, dec'd; THE BOARD OF TRUSTEES OF THE HANDLEY FUND, provided for by the Act of the General Assembly approved February 7th, 1896; and ALBERT BAKER et al., as trustee, and the persons constituting the said board of Handley trustees.\*

December 25, 1902.

1. MUNICIPAL CORPORATIONS—*Holding real and personal estate—Charitable trusts.*  
A municipal corporation may take and hold real estate, or personalty, *in trust* for purposes germane to the objects of the corporation, or which will promote, aid or assist in carrying out or perfecting those objects; and it may hold and execute a trust for *charitable objects* in accord with, or tending to promote, the purposes of its creation, although such a one as by its charter or general laws it might not have authority to establish, or to spend its corporate funds for.
2. MUNICIPAL CORPORATIONS—*Funds from public taxation—Gift by will for library.*  
A fund derived by a municipal corporation from public taxation cannot be used to collect and preserve a gift by will, for the purpose of establishing a public library, of an estate in a foreign jurisdiction which might prove valuable or not.
3. MUNICIPAL CORPORATIONS—*City solicitor—Official duty of—Extra compensation.*  
An officer cannot recover additional compensation to his salary when called on to discharge duties in the line of his official duty, however onerous and difficult they may be. But, when a city solicitor is not called on in his official capacity as city solicitor, but is employed to discharge duties not contemplated at the time of his appointment or election, and to be rendered in a foreign jurisdiction, and he is designated by name and not in his official capacity to render them, and in rendering them necessary expenses of travel are incurred which must have been contemplated at the time of his employment, he is entitled to receive compensation for his services in addition to his salary.
4. MUNICIPAL CORPORATIONS—*Party in interest—Right to employ and be heard by counsel—Private and public funds—Attorney's lien.* A party in interest to a suit has a constitutional right to be heard by counsel, which of necessity involves the right to employ counsel. The legislature cannot constitutionally take away from a city, acting in her private corporate capacity and beneficially interested under a will, the right to employ counsel to defend her rights and preserve her private funds, as distinguished from public funds derived by taxation. And for services rendered by such attorney, on proper employment, the law creates an equitable lien on the fund preserved.

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\*Reported by George C. Gregory.

5. MUNICIPAL CORPORATIONS—*City council—Reserving right to determine compensation for services.* If a city council in employing an attorney reserves the right to determine the compensation for his services, a demand on the council as indicated, and its failure or refusal to act, or unsatisfactory or unreasonable action, is a condition precedent to the right to maintain suit.
6. COMPENSATION FOR PROFESSIONAL SERVICES—*What considered in determining.* In determining what is reasonable compensation for professional services, consideration should be given to the nature and importance of the services rendered, the amount involved, the intricacy or doubtfulness of the claim, the attorney's standing in the profession for learning and character, and the result accomplished.
7. TRUSTEE AND CESTUI QUE TRUST—*Employing counsel by trustee.* Trustees who in good faith engage counsel to aid them in the execution of the trust are entitled to pay them out of the trust fund.
8. TRUSTEE AND CESTUI QUE TRUST—*Suits in name of trustee.* In order to enable the *cestui que trust* to maintain suit in the name of the trustee, it is unnecessary that the trustee should expressly authorize the suit.
9. TRUSTEE AND CESTUI QUE TRUST—*Reimbursement for expenses in preserving trust estate.* The *cestui que trust* is entitled to reimbursement for expenses incurred in good faith in attempting to protect and preserve the trust estate, and he may require the trustee to repay him out of the income of the estate, or out of the corpus if the income fail.
10. EQUITABLE ASSIGNMENT—*What constitutes.* A mere agreement to pay a debt out of a designated fund, when received, does not give an equitable lien on the fund, nor operate as an equitable assignment of it. Something more is necessary. To constitute an equitable assignment there must be an assignment or transfer of the fund or some *definite* portion of it, so that the person owing the debt or holding the fund on which the order is drawn can safely pay the order, and is compellable to do so, though forbidden by the drawer.

Upon a demurrer to bill in equity by attorney for professional services.

HON. C. E. NICOL, Judge.

This suit is to enforce a claim of complainant for the sum of \$12,500 for professional services rendered in connection with the estate of John Handley, dec'd, and also for the additional sum of \$200 for money actually expended in connection with said services, and the prayer of the complainant is that this aggregate sum of \$12,700, or such amount thereof as may be decreed him, may be declared a charge and lien on the funds now in the hands of the Board of Trustees of the Handley fund and that may thereafter come into the hands of the said Board.

The defendants demur to the bill of complainant for various

reasons, but without enumerating them all, they may be fairly epitomized as follows:—

1. The City of Winchester, as trustee, and the Board of Handley trustees are sued jointly, and a joint liability is charged against them both, while the whole case as stated in the bill shows no joint liability at any time against them.

This ground of demurrer was not pressed in argument, but it is sufficient to say, that both of these defendants were and are interested in the subject matter of the suit, and hence it was absolutely necessary to implead them both at one and the same time.

2. The case stated in the bill shows that any right to compensation the complainant might have, in addition to his salary as city solicitor, rests upon express contract had by the complainant with the city of Winchester, through its common council, and that the remedy on such contracts was and is plain, adequate and complete at law, and that no ground is stated to support the jurisdiction of a court of equity.

The complainant to support the jurisdiction of equity relies on, 1st, an equitable assignment, 2nd, an equitable lien, 3rd, the pendency of a chancery cause in this court, involving the fund, on which a lien is sought to be ascertained and enforced. These grounds will be considered *seriatim*.

As to an equitable assignment, the elements to constitute one are totally wanting in this case. A mere agreement to pay a debt out of a designated fund, when received, does not give an equitable lien on the fund, nor operate as an equitable assignment of it. Something more is necessary. To constitute an equitable assignment there must be an assignment or transfer of the fund or some *definite* portion of it, so that the person owing the debt or holding the fund, on which the order is drawn, can safely pay the order, and is compellable to do so, though forbidden by the drawer. *Hicks, trustee, v. Roanoke Brick Co.*, 94 Va., p. 741, per Judge Riely delivering the opinion. The complainant does not allege in his bill, that the entire fund, nor any *definite* portion thereof, was assigned to pay his claim, and does not claim that the amount of his claim is as yet determined, or ascertained.

As to an equitable lien. In order to consider this ground of jurisdiction it is necessary to consider briefly the circumstances

which surround this case. John Handley in his will in one clause says, "I give and bequeath to the city of Winchester, Frederick County, State of Virginia, the sum of two hundred and fifty thousand dollars, to be held, in trust by said city of Winchester for the purposes hereinafter named," and in a succeeding clause he provides for the accumulation of said \$250,000, until it reaches \$500,000, and then says, 'I order and direct the said city of Winchester to erect, construct, finish and open a public library for the free use of the people of the city of Winchester forever thereafter, said library shall be known and called 'The Handley Library.'"

In the suit of *Albert Baker et al. v. City of Winchester et al.*, in the circuit court of Frederick, Judge Harrison has decreed, that it is unnecessary to await the period of accumulation, but that the said \$250,000, so soon as available can be devoted to the erection of said library. After making various bequests and devises to different persons and corporations, John Handley leaves the bulk and residuum of his estate to the city of Winchester, as trustee, in the following clause: "All the rest and residue of my estate I give, devise and bequeath to the city of Winchester, Virginia, to be accumulated by said city for the period of twenty years, the income arising from said residue estate to be expended and laid out in said city, by the erection of school houses for the education of the poor."

John Handley gave the city of Winchester this splendid gift, *as trustee*, and to be applied by her to specified purposes, which are not only commendable in themselves, but are connected with and germane to the purposes for which municipal governments are established,—that is to promote and advance the welfare and happiness of the people.

A municipal corporation may take and hold real estate, or personalty, *in trust*, for purposes germane to the objects of the corporation, or which will promote, aid or assist in carrying out, or perfecting those objects. Dillon on Corporations, sec. 567. A corporation may hold and execute a trust, for *charitable objects*, in accord with or tending to promote the purposes of its creation, although such as it might not by its charter or general laws have authority to establish, or to spend its corporate funds for. *Jones v. Habersham*, 107 U. S. 189. In Virginia, corporations have power, where

it is not otherwise provided, to purchase, hold and grant estates real and personal. 2 Min. (1st Ed.) 585.

The 9th section of the charter of Winchester confers upon the municipal corporation "the right to purchase and accept gifts of and hold such real estate as it may deem necessary for the purposes of the city." Under section 1420 and section 1421 of the Code of Virginia, I am of the opinion that the city of Winchester in her corporate capacity, as trustee, had the power to take, hold and execute the Handley devise and bequest.

But the Act of the General Assembly of Virginia approved Feb. 7th, 1896, removes any doubt that may have existed on this subject. The said Act is entitled "An Act to enable the city of Winchester to accept the bequest of John Handley, dec'd, to validate the same and to provide for the administration thereof." It will be perceived that this Act embraces only one object, which is expressed in its title in accordance with section 15 of Article 5 of the Constitution of Virginia, in force at the time of its passage. This provision of section 15 Article 5 of the old Constitution is now contained *in verbis ipsissimis* in section 52 of Article 4 of the present Constitution of Virginia. Whilst, however, said Act has only a single object—that is legislation as to the Handley devise and bequest, yet it has, as expressed in its title, a two-fold purpose, viz.: 1st, to enable the city of Winchester to *accept* the bequest of John Handley, dec'd, and to *validate* the same, and 2nd, to provide for the *administration* thereof. Should any other object be contained in the body of the said Act, of which no notice is given in the title, it would be unconstitutional and void, even though cognate and germane to the object in the title. *Lacey v. Palmer*, 93 Va. 159; *Martin v. South Salem Land Co.*, 94 Va. 28; *Cahoon Tr. v. Town of Iron Gate*, 92 Va. 367. Several objects may be embraced in the same act, if cognate and germane to the main object expressed in the title, and the act will be held valid if the title is broad enough to cover the objects expressed in the title. But if the title is not broad enough to cover the act, it is valid only to the extent that the object is expressed in the title. *Lacy v. Palmer*, 93 Va. 159.

Now the question arises, did the city of Winchester take as *trustee* under the will of Handley, or by reason of the Act of Feb. 7th, 1896? There can be but one answer to this question. When

Handley died his property passed, of necessity, and *eo instanti*, in one of three ways, (1) under his will to his legatees or devisees, (2) or by the statute of descents to his heirs at law, (3) or in default of will, or heirs at law, it escheated to the Commonwealth. In a civilized country governed by laws, there can be no hiatus, or lapse in the title. It must vest some where; it cannot remain suspended. It seems indeed, and is by Judge Lomax stated to be a principle of universal law, that where, from any cause, there ceases to be an individual proprietor, it reverts back to the community. 1 Lomax Digest, 777; 2 Min. Inst. (1st Ed.) 586. The Act of Feb. 7th, 1896, in no wise sought to interfere with the title vested in the city of Winchester, *as trustee*, by reason of Handley's will, but it sought to enable Winchester to "*accept*" the same, and to "*validate*" the same. Could any language be found in the body of the Act inconsistent with this object expressed in its title, it would be inoperative for two reasons; 1st, it would be repugnant to sec. 15, Art. 5 of the Constitution, and 2d, because it is beyond legislative power to create or destroy estates in property, where the title has once vested. *Vide* Cooley's Const. Lim. 358 *et seq.*, and authorities there cited. *Vide* also *Greenough v. Greenough*, 11 Penn. 494. However, whilst the legislature neither attempted to nor indeed could divest the title of Winchester as trustee, to the property bequeathed and devised to her by Handley, yet it did provide for the administration thereof by a board of trustees to be known as the Handley Board of Trustees. On the passage of the Act of Feb. 7th, 1896, an analysis of the act leaves the status of the property left by Handley to the city of Winchester as trustee as follows: The legal title to the property remained in the city of Winchester, *as trustee*, to erect the library and erect school houses for her poor, but the *administration* and *control* of the fund was vested in the board of Handley trustees for the benefit or the *cestui que trust*—that is, the city of Winchester in her private corporate capacity, as distinguished from her public municipal capacity.

This brings us to the consideration of the power and the duty that remained in the city of Winchester, *as trustee*, and the Board of Handley Trustees after the passage of the Act of Feb. 7th, 1896. On Dec. 31, 1895, the Common Council of Winchester, in special session, adopted this resolution, viz.: "That the President and the City Solicitor be authorized to represent the City in Scranton, Pa.,

on Jan. 2nd, and in the event that the City Solicitor is unable to serve, that he and the President be authorized to select some attorney in the place of the Solicitor." On Jan. 20th, 1896, it was resolved by the Common Council of the city of Winchester, "that the City Solicitor be and he is hereby directed to file exceptions to the appraisal of the estate of Judge John Handley, which has been returned at the office of the register of wills, at Scranton, Pa., and that he take such other steps as may be necessary to protect the interest of the city of Winchester in said estate." These resolutions of Dec. 31st, 1895, and Jan. 20th, 1896, respectively, were adopted prior to Act of Feb. 7th, 1896, and referred to the complainant not by name, but as City Solicitor, and would be equally applicable to any other person, who might hold the office of City Solicitor at that time, or at the time the service might be rendered. The Common Council of Winchester on June 2nd, 1896, in regular session adopted this resolution, viz.: "Resolved that the council appoint Mr. R. M. Ward to assist the executors of the late Judge Handley in defending the interest of the city in the litigation at Scranton, Pa., the compensation for such services to be determined by the council."

It is contended that subsequent to the passage of the Act of Feb. 7th, 1896, any action of the Common Council of Winchester in regard to the Handley devise and bequest was unauthorized and null and void, because by reason of said Act all power and authority connected therewith had been transferred to the Board of Handley Trustees. In this contention I am unable to concur. After the passage of the Act of Feb. 7th, 1896, the city of Winchester, as *trustee*, was still the *cestui que trust*—was as beneficially interested as before, though the administration of the Handley fund, as a matter of convenience, had been transferred to the Board of Handley Trustees. A party in interest has a constitutional right to be heard by counsel. This principle usually refers to criminal cases, but I perceive no reason why it is not equally applicable to civil cases. *Vide* Cooley's Const. Lim. (2nd Ed.) 330 *et seq.* Certainly as to corporations, it must apply, as from their nature they cannot appear *in propria persona* in courts, but must do so by attorneys. The right to appear by counsel, *involves necessarily the right to employ counsel.* And I am unable to perceive how the legisla-



ture could constitutionally take away the right from the city of Winchester, *in her private corporate capacity as trustee* and beneficially interested, under the Handley will, of employing counsel to defend her rights and preserve her private trust funds, as distinguished from public funds derived by taxation. It is an elementary principle, that in all suits and actions involving the administrations of trusts, trustees and beneficiary are necessary parties, 27 Am. & Eng. Enc. Law (2nd Ed.), 285. A trustee and a *cestui que trust* may unite in a bill for the recovery of the trust estate. *Jennings v. Davis*, 5 Dana (Ky.) 127. A trustee may either bring suit in his own name, or in conjunction with his *cestui que trust*. *Harris v. Mabane*, 66 N. Car. 334. It is unnecessary, in order to enable the *cestui que trust* to maintain suit in the name of the trustee, that the trustee should expressly authorize the suit. *Chambersburg Ins. Co. v. Smith*, 11 Pa., St. 120. The *cestui que trust* is entitled to reimbursement of the expenses which he has incurred in good faith in attempting to protect and preserve the trust estate, and he may require the trustee to repay him out of the income of the estate first, or in case the income fails, out of the corpus. 27 Am. & Eng. Enc. Law (2nd Ed.), 263. Taxes paid by a *cestui que trust* are a lien upon the land, and may be paid out of the trust fund. *Gary v. May*, 16 Ohio 66.

On Oct. 5th, 1897, a committee from the Board of the Handley Trustees consisting of Messrs. Albert Baker and S. H. Hansbrough appeared before the Common Council of Winchester, and stated that since the death of Mr. Ammerman, late counsel for the city, it was important that his place be filled, and after discussion, on the same day, the council adopted a resolution employing "Hon. Holmes Conrad additional counsel, to represent the city of Winchester in the chancery suit now pending in the court of Pa. in which certain persons claiming to be heirs at law of Judge Handley, dec'd, are plaintiffs and the executors of the will of said Handley are the defendants, the object of the said suit being to attack the residuary bequest by said will to the city of Winchester, and the said Conrad is employed to appear for the city of Winchester and do whatever in his judgment may be proper to protect its interests, and that he be paid out of the funds of the Handley estate." Certainly, when the Board of Handley Trustees, through its committee, appealed to the Common Council of Winchester on

Oct. 5th, 1897, to appoint or employ additional counsel to represent the city in the Handley will litigation in Pennsylvania, it recognized the right of the Common Council so to do, and this was over a year after the passage of the Act of Feb. 7th, 1896, and if it were material, the said Board would now be estopped to deny the right of the Common Council to employ counsel, even after the passage of said Act. Whilst the construction of parties, as to contracts and legislative statutes, is not final and conclusive, yet their mutual construction and contemporaneous conduct thereunder properly receive weighty consideration by the courts.

I am of opinion, that the City of Winchester in her *private corporate* capacity, and as *trustee* under the will of John Handley, had the right, speaking through her Common Council, to employ counsel to preserve and protect the trust fund, to which she was entitled under Handley's will, both before and after the passage of the Act of Feb. 7th, 1896, and to bind the trust fund for all absolutely necessary expenses in the way of costs and counsel fees. The Handley donation, being to Winchester as *trustee*, for specific purposes, she could not use the same for ordinary municipal purposes, as paving and lighting the streets and so on, and not being derived by public taxation, I know of no authority by which the fund derived by public taxation could be used to preserve and collect an estate in a foreign jurisdiction which might prove valuable or not. Pledging the funds to be collected by the city from the donation could in no way imperil any right of the city, because if nothing were collected the city would be none the poorer. And for services rendered by an attorney, on proper employment, by the city in the Handley litigation, and for the purpose of preserving the fund, I am of opinion that the law creates an *equitable lien*, in favor of the attorney, on the fund preserved, for his services, even though the Common Council of Winchester did not expressly contract that the attorney should be paid for his services. Were not this so, the City of Winchester would have been powerless to employ counsel to represent her when her interest under the Handley will was assailed, because it is conceded that she had no right to employ counsel to represent her in a foreign jurisdiction, and to be paid out of the revenue derived by public taxation. Trustees who in good faith engage counsel

to aid them in the execution of the trust are entitled to pay them out of the trust fund. *Cochran v. R. & A. R. R.*, 91 Va. 339.

In *Guggenheimer v. Rogers*, 95 Va. 711, the trustee paid an attorney a fee out of the trust fund for his services in protecting the same, and his action was approved by the Circuit Court and the Court of Appeals.

In *Thomas v. Turner's Admr.*, 87 Va. 1, the contract of a prominent and able lawyer (Capt. Fitzpatrick), was held *invalid* and *annulled*, but the court, speaking through Judge Lewis, said we think a reasonable fee ought to be allowed for protecting the trust estate against the claims asserted against it, and that an allowance of \$5,000 to be paid out of the *corpus* of the estate, is reasonable and ample. This allowance in *Thomas v. Turner* was made on the basis of an implied contract. *Vide Idem*, p. 23.

I think, in this case, the complainant has an *equitable lien* on the Handley fund, in whosoever hands it may be, for his services rendered in preserving said fund after a proper employment by the city of Winchester, as trustee under the will of John Handley, dec'd, and that equity has jurisdiction to entertain his suit.

In *Fitzgerald v. Irby*, 99 Va. 81, the Court of Appeals recommended an *independent* suit to enforce an attorney's lien. In *State Bank of Virginia v. Domestic Sewing Machine Co.*, 99 Va. 411, it was held, "a court of equity will follow a fund diverted from the owner, or charged with a lien, as far as it can be traced, and will enforce the true owner's rights against any property in which it may have been invested."

The other ground of equitable relief relied on by complainant is the pendency in this court of a suit to administer the Handley fund. In view of what has been said and the conclusion reached in this case, I deem it unnecessary to consider this ground of equitable relief.

3. The defendants also demur to complainant's bill on the ground that during all the time the services were rendered he was city solicitor of Winchester, and, therefore, is estopped to claim any compensation in addition to his salary of \$100 per annum.

The authorities on the right of an officer of a city to receive any compensation, other than a salary, are very numerous and conflicting. Those cited by counsel for demurrants and in support

of their contention are to the following effect. The city could not pay an officer compensation beyond his salary, because that would be in violation of public policy. *Greenhood on Public Policy*, Rule 277, p. 328. Where the corporate rights or interests of the city are not involved in the litigation, no right exists to employ counsel. *Regina v. Leeds*, 4 Queen B. R., 796. An attorney who is city attorney cannot recover additional compensation to his salary. *Detroit v. Whitman*, 27 Mich. 281; *Dillon on Mun. Corp.*, (4th ed.) sec. 223; *City of Memphis v. Brown*, 20 Wall. 289; *Carroll v. St. Louis*, 12 Mo. 444; *Rice v. City of Osage*, 88 Iowa 559; *Vandercool v. Williams*, 106 Ind. 345; *Evan v. City of Trenton*, 24 N. J. 767. An officer, who accepts office to which a fixed salary is attached must perform the duties without extra compensation. *Bay v. Webster Co.*, 18 Neb. 131; *People v. Denby*, 23 N. J. 269; *Wagener v. State*, 3 Womple (Tenn.) 480; *Turpin v. Com.*, 7 Ind. 172; ——— v. *Blake*, 21 Ind. 32; *Evans v. Trenton*, 24 N. J. L. 764; *Dectur v. Vermilion*, 77 Ill. 315; *Rowe v. Kern Co.*, 72 Cal. 353; *Adams Co. v. Hunter*, 43 N. W. 208; *Guffin v. Clay County*, 63 Iowa 425; *Buck v. ———*, 109 Cal. ; *Coms. of Leavenworth Co. v. Brewer*, 9 Kans. 308, 316, 318; *Butler v. Board of Coms. of Neosho Co.*, 15 Kans. 156; *Hoffman v. Board of Coms. Greenwood Co.*, 23 Kans. 282; same case again, 25 Kans. 63; *White v. Polk Co.*, 17 Iowa 413.

Counsel for complainant cite in support of the proposition that the city can allow the city solicitor additional compensation; *Baldwin v. Phila.*, 99 Pa. 164; *Milwaukee Co. v. Hachett*, 21 Wis. 613; *Thompson v. Philips*, 12 Ohio St. 617; *Folger v. U. S.*, 103 U. S. 38; *Converse v. U. S.*, 21 How. 469; *U. S. v. Saunders*, 120 U. S. 126, 130; *U. S. v. Harman*, 147 U. S. 268; *U. S. v. Erwin*, 147 U. S. 685; 19 Am. & Eng. Enc Law 530, and authorities cited to note four of Idem; *Bright v. Chenango Co.*, 18 Johns 242; *People ex rel. Hilton v. Supervisors of Albany*, 12 Wend. 257; 1 *Dillon on Corp.* (4th ed.) sec. 233 and notes to sec. 234. The city as trustee has right to employ counsel. 1 *Dillon on Corp.* (4th ed.) sec. 479 and note; *Cochran v. R. & A.*, 91 Va. 342.

There is no direct adjudication on the question in Virginia. The nearest cases touching the question are *Norfolk v. Pollard*, 94 Va. 279, and *Price, Auditor, v. Smith*, 93 Va. 17, and the tendency of these cases is against the right of additional compensa-

tion, but the facts there involved are dissimilar to the facts here presented.

Without seeking to reconcile the conflict in the adjudged cases, because this is impossible, resort must be had to the better opinion. My conclusion, on a consideration of the authorities, is that the better opinion and rule, is that an officer cannot recover additional compensation to his salary, when called on to discharge duties in the line of his official duty, however onerous and difficult they may be. Should he be dissatisfied and be unwilling to proceed for the compensation attached to his office, his remedy is to resign. Dillon on Corp. (4th ed.) sec. 233. However, when a city solicitor is *not* called on in his official capacity, as city solicitor, but is employed to discharge duties not contemplated at the time of his appointment or election, and to be rendered in a foreign jurisdiction, and he is designated not in his official capacity, but by name, to render them, and in rendering them necessary expenses of traveling are incurred and must have been contemplated at the time of his employment, I am of opinion that he is entitled to receive compensation for his services, *in addition to his salary*. Dillon on Corp. (4th ed.) sec. 234; *People v. Supervisors*, 12 Wend. N. Y. 257; *Bright v. Supervisors*, 18 Johns (N. Y.) 242; *Mallory v. Supervisors*, 2 Cowen (N. Y.) 531, 533; *Detroit v. Redfield*, 19 Mich. 376; *McBride v. Detroit*, 47 Mich. 236, same case, 49 Mich. 239; *Huffman v. Greenwood Co.*, 23 Kans. 281; *Butler v. Neosho Co.*, 15 Kans. 178; *Leavenworth Co. v. Brewer*, 9 Kans. 307; *Greenhood on Public Policy*, Rule 278, p. 334.

Any other rule would be shocking to a sense of justice. When arduous and meritorious services have been rendered, outside of the regular duties of an official, and highly beneficial to the trust fund, as those of the complainant must be assumed, on demurrer, to have been, it would strangely comport with fair dealing for the complainant to be then met successfully, by the *trustee* and *cestui que trust*, with the plea of estoppel.

It must also be borne in mind that the complainant was employed by the city of Winchester in her *private corporate capacity*, as *trustee*, under the Handley will, as distinguished from her ordinary municipal capacity, and in this respect this case is differentiated from the ordinary rule against additional compensation. 1 Dillon on Corp. (4th ed.) sec. 479 and note.

Applying these rules to the case at bar, I am of opinion that when the complainant was called on, *not* by name, but in his official capacity, as city solicitor, under the resolution of the Common Council of Winchester of Dec. 31, 1895, and of Jan. 20 1896, respectively, to render services in connection with the Handley devise and bequest, that he comes within the rule against additional compensation, so far as the services rendered under those resolutions are concerned, and is estopped from claiming compensation for them.

In these resolutions, there is no mention of compensation for services to be rendered under them, and it cannot be fairly claimed on a consideration of them that both the Common Council and the complainant contemplated other and further compensation for services to be rendered under them, than the salary attached to the office of city solicitor, and certainly no additional compensation was then stipulated for by the contracting parties, if the directions given in those resolutions to the city solicitor can be designated a contract.

However, under the resolution of the Common Council of Winchester of June 2nd, 1896, appointing "R. M. Ward to assist the executors of the late Judge Handley in defending the interest of the city in the litigation at Scranton, Pa., *the compensation to be determined by the council*," I am of opinion, that the rule against additional compensation does not obtain, and that he is entitled to an *equitable lien* on the Handley fund for his services rendered, under and in pursuance of that resolution and contract of employment. It will be perceived, that the resolution of June 2nd, 1896, contemplated *additional compensation*, and required services to be rendered in a foreign jurisdiction, and in the rendition of which traveling expenses must necessarily be incurred, and also required services which were not contemplated when the office of city solicitor was created and the complainant was appointed to fill that office, because Judge Handley was then living, and his intention to make Winchester the object of his bounty was then unknown.

But it is contended, that if the Common Council of Winchester could, by the resolution of June 2nd, 1896, create any lien on the Handley fund, it could dissipate the whole fund. This is utterly untenable, because under the law the whole power of the

City Council, as representing the *cestui que trust*, is exhausted, so far as creating any lien on the fund is concerned, when it has paid or provided for the absolutely necessary costs of preserving and collecting the fund, which costs, of course, would comprehend reasonable counsel fees. The fund donated to Winchester by Judge Handley is a sacred trust, and can be used only for the erection of the library and the education of the poor of Winchester, and to divert it to any other purpose would not only be a breach of trust, but would not be permitted. This exercise of power on the part of the Common Council of Winchester by its resolution of June 2d, 1896, was not only commendable, but involved the right of self defence. It was its duty to defend, protect and preserve the Handley fund in such way as its wisdom dictated, in order that it might be dedicated to the high purposes of its donor. To have done less, would have been unjust to the memory of the man, who gave the bulk of his fortune to the people of Winchester.

I fail also to perceive how the right of the Common Council to charge the Handley fund with the cost of preservation and collection in any manner conflicts with the duty of the Handley Trustees under the Act of Feb. 7, 1896. The Handley Trustees receive and administer the *net* fund, which of course is the *gross* sum, less the cost of preservation and collection, and when it has passed into its *net* form in the hands of the Handley Trustees, it has then passed forever beyond the control and dominion of the Common Council of Winchester, except to see that it is devoted to carrying out the trusts declared in Judge Handley's will, in the manner prescribed by law, and the Act of Feb. 7th, 1896. There is no divided responsibility, and can be no conflict, because the Act of Feb. 7th, 1896, has prescribed a simple and inexpensive method of administration of the fund, and in justice it should be added that the public spirited men who are willing to serve, without compensation, as trustees of that fund and under said Act are entitled to the gratitude of the people of Winchester and doubtless do and will receive it.

In connection with the services rendered by the complainant under the resolution of June 2nd, 1896, I do not think it improper to express my opinion as to how the value of those services should be estimated. In determining, what is reasonable compensation

for professional services, consideration should be given to the nature and importance of the services rendered, the amount involved, the intricacy or doubtfulness of the claim, the attorney's standing in the profession for learning and character, and the result accomplished. *Kittridge v. Armstrong*, Sup. Ct. Cin. Weekly Law Bul. 249; Am. Dig. (1893) p. 475, sec. 85.

4. The defendants further demur on the ground that the resolution of June 2, 1896, was not passed in accordance with sec. 1035 of the Code of Virginia, providing that no debt shall be contracted by a city council, unless by a vote of two-thirds of the council, and that the vote be taken by yeas and nays, and recorded on the journal.

If the resolution of June 2nd, 1896, sought to create a charge on the public treasury of Winchester, and to be paid out of money raised by taxation, I think the objection would be well taken. But it could have no such effect, and if any charge was created, it was out of the Handley fund, and therefore I do not think sec. 1035 of the Code applies to this case.

5. The defendants further demur on the ground that in the resolution of June 2d, 1896, the Common Council *reserved the right to determine the amount of complainant's compensation*, and that no suit could be brought until the council had been called upon to fix the amount and refused to do so.

The complainant seeks to evade this objection by relying on the resolution of the Common Council of July 26th, 1898, "authorizing the finance committee to contract with Messrs. Conrad and Ward for a stated compensation for their services, to be paid out of the funds in the hands of the Handley Trustees."

On Sept. 6th, 1898, Mr. Fuller reported to the council "that the finance committee had conferred with Maj. Conrad as to his compensation for services to be rendered in behalf of the city in the Handley litigation, that Maj. C. declined to name a sum, but Mr. F. was satisfied that Maj. Conrad intended to be very liberal in the matter." On Oct. 4th, 1898, at a meeting of the council the report of Mr. Fuller as to the progress of the Handley suit, together with a note from Mr. R. M. Ward, as to fees to be charged, was received, *on motion*. In Mr. Ward's note, which is without date, he stated it "is impossible at this date to fix any



specified sum" because that the Handley litigation was still pending and undetermined, and the services yet to be rendered by him were therefore a matter of conjecture, but he further stated in his note, "I agree, however, that my charges for services rendered in said suit from its institution to its final determination, shall be such, as shall be determined at the conclusion of the litigation to be reasonable, for the services rendered—to be paid by the city out of the funds of the Handley estate."

It is contended by complainant that the action of the council on July 26th, 1898, and on Oct. 4th, 1898, constituted a new contract. I am unable to concur in this view. The reception of Mr. Ward's communication on Oct. 4th, 1898, by the council, "*on motion*," without further action on the part of the council, created no new contract. No dissent from, nor assent to, the proposition of the letter was expressed by the council. The minds of the parties reached and agreed on no conclusion, so as to constitute a contract. Therefore, in my opinion, the complainant's contract of service and employment must be relegated to the resolution of the council of June 2nd, 1896, in which the council reserved the right to determine the compensation for the services to be rendered by complainant in the Handley litigation. After the services had been rendered by the complainant, I think, under the resolution of June 2nd, 1896, that he should have submitted his claim for compensation to the council, and had the council then failed or refused to fix his compensation, or had fixed it at an unreasonable amount, or at such a sum as was unsatisfactory to him, that his right to bring his action would have then accrued. It seems to me his demand on the council as indicated, and its failure or refusal to act or unsatisfactory or unreasonable action, was a *condition precedent* to the right of complainant to maintain his suit. Where an act is to be done by one party by way of *condition precedent* to his right to claim performance on the part of the other, he cannot claim such performance without the doing of such act, or his readiness and offer to do it. *B. & O. R. R. Co. v. McCullough*, 12 Gratt. 597; *Brockenbrough v. Ward*, 4 Rand. 352; 4 Am. & Eng. Ency. Pl. & Pr., 628 *et seq.* *Non constat*, that on demanding that the council should fix his compensation that it would not have done so in a manner entirely satisfactory to him. The bill of

complaint fails to allege any such demand, and failure or refusal of the council to act, or of fixing an unsatisfactory or unreasonable amount of compensation, and this being a *condition precedent* to the right of the complainant to sue, I think for this reason that the demurrer of the defendants should be sustained and the bill dismissed, but *without prejudice* to the complainant to make the demand on the council as indicated to fix his compensation for services rendered, and in the event of its failure or refusal so to do, or naming a sum that is unreasonable or unsatisfactory to the complainant, *to bring a new suit*.